84-1320

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JERRY D. RADFORD,

Petitioner,

vs.

ARNOLD R. JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION, AND ANTHONY J. CELEBREZZE, ATTORNEY GENERAL OF OHIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether self-defense negates some aspect of the offense of murder which is so rooted in the traditions and conscience of our people that a State, by virtue of the Due Process Clause, can never place the burden of persuasion as to self-defense on a defendant.

2. Whether the Due Process Clause forbids requiring a defendant to prove self-defense because the principle that a killing in self-defense is not a crime is so rooted in the traditions and conscience of our people that the absence of self-defense is itself an implicit but necessary element of every murder charge.

3. Whether the Due Process Clause requires merely an "elements" analysis of the offense as defined by the State to determine if the State may require the defendant to prove self-defense.

4. Whether the Due Process Clause forbids the State of Ohio from placing the burden of persuasion as to self-defense on the defendant because self-defense negates an element of the offense of murder as it is defined in Ohio.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JERRY D. RADFORD,

Petitioner,

vs.

ARNOLD R. JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION, AND ANTHONY J. CELEBREZZE, ATTORNEY GENERAL OF OHIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Jerry D. Radford, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 19, 1984.

OPINIONS BELOW

The opinions of the court of appeals, the district court, and the state court of appeals appear in the Appendix hereto and are not reported. No opinion was rendered by the Ohio Supreme Court nor by the state trial court.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 19, 1984, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. How Federal Question Is Presented

The jurisdiction of the district court was invoked under 28 U.S.C. Section 2254 by the filing of a petition for a writ of habeas corpus alleging that Petitioner's conviction in state court was obtained in violation of the constitution.

Petitioner was indicted on September 26, 1980, for one count of aggravated murder under Ohio Revised Code Section 2903.01(A). A not guilty plea was entered and Petitioner was tried before a jury. The trial judge instructed the jury on the elements of aggravated murder and the lesser included offense of murder, Ohio Revised Code Section 2903.02. Transcript of Proceedings in the Common Pleas Court of Greene County, Ohio [hereinafter "Tr."] at 584-88. The trial judge also instructed the jury on the elements of self-defense. Tr. 588-90. Over Petitioner's objections, Tr. 526, 534, 596, the jury was instructed that Petitioner was required to prove self-defense by a preponderance of the evidence. Tr. 590-91.

During deliberations, the jury asked to be reinstructed on the definitions of aggravated murder, murder, and self-defense. Tr. 598-99. The jury subsequently returned a verdict of guilty of the lesser included offense of murder and Petitioner was sentenced to a term of fifteen years to life imprisonment.

Petitioner appealed on the ground, *inter alia*, that requiring him to prove self-defense by a preponderance of the evidence violated his rights under the Fourteenth Amendment to the United States Constitution. His conviction was affirmed by the state appellate court. *State* v. *Radford*, Case No. 81-CA-15 (Greene County, Ohio, Ct. App., November 12, 1981). The Ohio Supreme Court overruled his motion for leave to appeal. *State* v. *Radford*, Case No. 82-66 (Ohio Sup. Ct., March 9, 1982).

On November 29, 1982, Petitioner filed his petition for a writ of habeas corpus in the district court, attacking his conviction on the ground stated above. The district judge found that the challenged instruction did not violate Petitioner's constitutional rights and, on January 20, 1984, dismissed the petition. Petitioner thereupon appealed to the federal court of appeals which, on November 19, 1984, affirmed the judgment of the district court.

B. Statement of the Material Facts

Petitioner was at his home with his family on Sunday evening, January 20, 1980, when the deceased, Keith Harris, arrived uninvited. Tr. 457-59. According to the State's own witness to the shooting, David Combs, Harris was sitting on Petitioner's couch with a gun in his hand, Tr. 217, and appeared to be "high." Tr. 218. The coroner testified that Harris' body contained alcohol, methaqualone, and phencyclidine (PCP). Tr. 140.

Again according to David Combs' testimony, Harris started walking toward Petitioner with "something shiny." Petitioner twice told Harris to leave his house but Harris kept coming. Harris "acted like he was going to tackle" Petitioner, reached toward the shiny object as he went "down in that stance," and then Petitioner shot. Tr. 220-24. Harris fell to the ground, "tried to get up again," and appeared to be "trying to grab [Petitioner's] legs" when Petitioner shot a second time. Tr.

224-26. On cross examination, it was brought out that, in a prior statement, Combs had sworn that Harris had a gun and was acting crazy, that Combs was scared of Harris for those reasons, that Harris charged Petitioner twice, and that Petitioner shot in self-defense. Combs reaffirmed that account in his trial testimony. Tr. 228-30.

Petitioner testified that he had known Harris since childhood. Tr. 458. Not long after Harris arrived that evening, he began to argue with Petitioner, claiming that Petitioner had embarrassed him during an incident a couple of weeks before (Petitioner had intervened in an argument between Harris and a third party, both of whom were armed). Tr. 463-65. Harris then pulled a gun and, while sitting on Petitioner's couch, pointed it at Petitioner and told Petitioner he wanted to kill him. Tr. 465-66.

Petitioner left the room to avoid the argument. Tr. 463-64, 466. Harris persisted in following Petitioner, "getting more meaner and kept telling me [Petitioner] he was going to kill me." Tr. 466-67. As Petitioner stood talking to David Combs, Harris approached him with the gun in his hand, stumbling over Petitioner's young son in the process. Petitioner got his own gun out of his desk drawer and ordered Harris to leave his home. Instead, Harris charged him and he fired. Tr. 467. Harris kept coming at him and Petitioner fired a second time. Tr. 468. The coroner testified that the first shot hit no vital organs nor would it have knocked Harris down. Tr. 148-50.

Petitioner then asked his wife to call the police. Tr. 468. The police officers testified that Petitioner was cooperative and turned his gun over to them. Tr. 172, 212.

The State argued that Petitioner had lured Harris to his home that evening (with Petitioner's wife and young children present) for the express purpose of collecting a debt or else Petitioner would "blow his blankety blank brains out." Tr. 545-46. The jury rejected this argument, finding no prior calculation and design when it found Petitioner not guilty of aggravated murder but guilty of the lesser included offense of murder.

REASONS FOR GRANTING THE WRIT

THE FEDERAL COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The existing pronouncements by this Court do not provide sufficient guidelines for the lower courts to decide the constitutionality of requiring a defendant to prove self-defense. The lower courts have attempted to strike the proper balance with the tools at hand, but in the process they have increased the tension between the holdings in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), and *Patterson* v. *New York*, 432 U.S. 197 (1977), to the breaking point. Principles governing mitigating factors, such as the heat of passion or extreme emotional disturbance which this Court considered in *Mullaney* and *Patterson*, are inadequate to address the question of self-defense. As stated by one court when faced with this problem: "What the Court failed to answer – or question – was how the Constitution requires us to deal with an affirmative defense which constitutes not merely confession and avoidance but rather a complete refutation of the existence of the crime in the first place." *Thomas* v. *Leeke*, 725 F.2d 246, 250 (4th Cir. 1984).

Do the principles of *Mullaney*, *Patterson*, and *In re Winship*, 397 U.S. 358 (1970), call merely for an "elements" analysis of the issue? This approach has led to the spectacle of federal courts laboriously surveying state law to determine, sometimes contrary to the state courts, what is or is not an element of a state offense. Naturally enough, the results vary from State to State. *Compare Holloway* v. *McElroy*, 632 F.2d 605 (5th Cir. 1980) (because of the way Georgia's decisional and statutory law defines offenses, the Constitution prohibits placing the burden of persuasion as to self-defense on the defendant), *with* the Sixth Circuit's opinion in this case (because of the way Ohio's decisional and statutory law defines offenses, the Constitution does not prohibit placing the burden of per-

suasion as to self-defense on the defendant). The folly of the distinctions upon which an elements analysis can be based is epitomized by the esoteric discussions concerning whether "unlawfulness" is or is not an element of a crime in a particular State. *See Thomas* v. *Leeke*, 725 F.2d at 251 n.4. Should this critical issue turn on whether a State defines a crime as unlawful?

If a mere "elements" analysis of the question is appropriate, then the results both in Georgia and Ohio may be correct and not inconsistent. But that represents a particularly gratuitous interference by the federal courts in state matters. Why forbid Georgia from doing directly what it can do in the roundabout manner of adopting Ohio's system? And if Ohio can devise a system whereby the defendant may be required to prove self-defense, surely the Constitution does not prevent Maine from revising its system so that the defendant may be required to prove "the heat of passion on sudden provocation." *Mullaney* v. *Wilbur*, 421 U.S. at 691. *Patterson* notes that there are limits beyond which the States may not go in reallocating burdens of proof, 432 U.S. at 210, but it does not forbid reallocation within those limits. Better that *Mullaney* be overruled than linger as such a nearly random obstacle to the administration of criminal justice.

If *Mullaney* remains good law, it is because it represents more than an *ad hoc* analysis of Maine's criminal justice provisions. But exactly what does it represent? This Court lent support to the idea that it calls for some sort of elements analysis in *Engle* v. *Isaac*, 456 U.S. 107 (1982).

> Respondents also allege that, even without considering Section 2901.05, Ohio could not constitutionally shift the burden of proving self-defense to them. All of the crimes charged against them require a showing of purposeful or knowing behavior. These terms, according to respondents, imply a degree of culpability that is absent when a person acts in self-defense. See Committee Comment to Ohio Rev. Code Ann. Section 2901.21 (1975) ("gen-

> erally, an offense is not committed unless a person . . . has a certain guilty state of mind at the time of his act or failure [to act]"); *State* v. *Clifton*, 32 Ohio App. 2d 284, 286-87, 290 N.E.2d 921, 923 (1972) ("one who kills in self-defense does so without the *mens rea* that otherwise would render him culpable of the homicide"). In addition, Ohio punishes only actions that are voluntary, Ohio Rev. Code Ann. Sections 2901.21(A)(1) (1975), and unlawful, *State* v. *Simon*, No. 6262, p. 13 (Ct. App. Montgomery County, Ohio, Jan. 16, 1980), modified on reconsideration (Jan. 22, 1980). Self-defense, respondents urge, negates these elements of criminal behavior. Therefore, once the defendant raises the possibility of self-defense, respondents contend that the State must disprove that defense as part of its task of establishing guilty *mens rea*, voluntariness, and unlawfulness. The Due Process Clause, according to respondents' interpretation of *Winship*, *Mullaney*, and *Patterson*, forbids the States to disavow any portion of this burden.
>
> This argument states a colorable constitutional claim.

456 U.S. at 121-22.

Petitioner would add that, at least when the offense is murder under Ohio Revised Code Section 2903.02(A), which provides "No person shall purposely cause the death of another," self-defense squarely negates the guilty *mens rea*. The culpable mental state required under Ohio Revised Code Section 2903.02(A) is "purposely," defined in Ohio Revised Code Section 2901.22(A) as follows: "A person acts purposely when it is his *specific intention* to cause a certain result . . . ." Emphasis added. Therefore, in order to convict of murder under Ohio Revised Code Section 2903.02(A), the prosecution must prove a specific intention to kill.

On the other hand, the elements of self-defense in Ohio are:

> 1. The slayer was not at fault in creating the situation giving rise to the affray;

> 2. The slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and
>
> 3. The slayer must not have violated any duty to retreat or avoid the danger.

State v. *Robbins*, 58 Ohio St. 2d 74 (1979), paragraph two of the court's syllabus. According to the second element of self-defense, above, the accused's specific intent must be to protect himself. This is inconsistent with a specific intent to kill the attacker. The accused may "knowingly" kill the attacker, in the sense that he may be aware that his conduct will probably cause that result, as "knowingly" is defined in Ohio, *see* Ohio Revised Code Section 2901.22(B), but his specific intent must be to protect himself. For this reason, under the analysis suggested in *Engle* v. *Isaac*, 456 U.S. at 121-22, self-defense is inconsistent with and negates the element of "purposely" in murder as defined in Ohio Revised Code Section 2903.02.

It is Petitioner's contention, however, at least with regard to the affirmative defense of self-defense, which is unique in not merely mitigating but justifying the killing, that a more fundamental analysis must be undertaken, without regard to how a State may define its offenses. *Patterson* affirms the principle that it is generally within a State's power to regulate procedures under which burdens of proof are allocated, and that the Due Process Clause does not proscribe the State's decision "unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 432 U.S. at 202 (citations omitted). What principle of justice is more deeply rooted in the traditions and conscience of our people or more fundamental than that of self-defense?

Blackstone has been quoted on self-defense as follows:

> Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.

Reed v. *State*, 11 Tex. Ct. App. 509, 517 (1882). Neither the United States, nor any State, could abolish self-defense and thereby require by force of law that an individual submit to a deadly attack without defending himself.

In the course of its discussion of the history of the distinction between murder and manslaughter, this Court in *Mullaney* noted that self-defense has an even longer tradition. 421 U.S. at 692. This Court unanimously concluded:

> Maine law requires a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence. This is an intolerable result in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter. *In re Winship*, 397 U.S., at 372 (concurring opinion). We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.

421 U.S. at 703-04 (emphasis in original). The result could be no different when the issue is self-defense, with its more fundamental importance, venerable tradition, and critical distinction between guilt and innocence. *See Holloway* v. *McElroy*, 632 F.2d at 636 n.49, and authorities cited therein.

In determining that proof beyond a reasonable doubt in a criminal case is a fundamental principle of justice, this Court stated:

> The requirement that guilt of a criminal charge be established beyond a reasonable doubt dates at least from our early years as a Nation. . . . It is now accepted in common law jurisdictions as the measure of persuasion

> by which the prosecution must convince the trier of all the essential elements of guilt. Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does reflect a profound judgment about the way in which law should be enforced and justice administered.

In re Winship, 397 U.S. at 361-62 (citations omitted).

Self-defense itself, of course, has absolutely unanimous recognition. More interesting, however, is that, like the reasonable-doubt standard, the prohibition against placing the burden on the accused to prove self-defense by a preponderance of the evidence has virtually unanimous adherence. Table 1 in the Appendix hereto, infra, at 23a, shows that of the 50 States, only Ohio requires the accused to prove self-defense. Table 2, infra, at 24a, catalogues the authorities establishing the burdens in the various States. At the least, a profound judgment has been made about the way in which law should be enforced and justice administered.

Do the principles of *Winship*, *Mullaney*, and *Patterson*, therefore, prohibit placing the burden of persuasion as to self-defense on the defendant? This Court has had at least two recent opportunities to answer this question. Once, the Court was prevented from reaching the question by a finding of waiver. *Engle* v. *Isaac*, 456 U.S. 107 (1982). On another occasion, the Court perhaps was deterred by the existence of the collateral issue of the "battered woman's syndrome." *Moran* v. *Ohio*, — U.S. —, 105 S. Ct. 350 (1984) (Brennan, J., dissenting from denial of certiorari). This case presents the question cleanly and compellingly, with no question of waiver nor distracting collateral issues.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

No. 84-3174

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the court.
This notice is to be *prominently* displayed if this decision is reproduced.

JERRY D. RADFORD,
Plaintiff-Appellant,

v.

ARNOLD R. JAGO;
WILLIAM J. BROWN,
Defendants-Appellees.

ORDER

[Filed November 19, 1984]

BEFORE: MERRITT and KENNEDY, Circuit Judges; and PRATT, District Judge*

Radford appeals from the district court judgment which dismissed his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. This case has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. After examination of the record, including the state court tran-

* The Honorable Philip Pratt, U.S. District Judge for the Eastern District of Michigan, sitting by designation.

scripts, and the briefs of the parties, this panel agrees unanimously that oral argument is not necessary. Rule 34(a), Federal Rules of Appellate Procedure.

In 1980 Radford was indicted for aggravated murder in violation of Ohio Rev. Code § 2903.01. A jury convicted Radford of the lesser included offense of murder in violation of Ohio Rev. Code § 2903.02, and sentenced him to 15 years to life imprisonment. Radford's conviction was affirmed by the Greene County Court of Appeals, and the Ohio Supreme Court denied leave to appeal.

On November 29, 1982 Radford filed his habeas petition in the district court. The sole ground for relief raised was that the jury instruction which placed upon him the burden of proving self-defense by a preponderance of the evidence violated the Due Process Clause of the United States Constitution. In a well reasoned opinion, the district court held that a jury instruction which places upon the accused the burden of proving self-defense does not offend due process. The petition was dismissed.

Upon careful consideration, this Court concludes that District Judge Walter H. Rice correctly found that Radford was not entitled to habeas relief.

When the Ohio Legislature amended its burden of proof statute, Ohio Rev. Code § 2901.05(A), it made clear its intent to place upon the accused the burden of proving affirmative defenses by a preponderance of the evidence. Ohio appellate courts have interpreted the amended statute and have held that jury instructions requiring the accused to prove his affirmative defenses by a preponderance of the evidence do not unconstitutionally shift the burden of proof from the prosecution to the accused. *State* v. *Davis*, 8 Ohio App.3d 205, 456 N.E.2d 1256 (1982), *appeal denied*, No. 83-208, (S.Ct. Ohio, April 20, 1983); *State* v. *Snowden*, 7 Ohio App.3d 358, 455 N.E.2d 1058 (1982); *State* v. *Howze*, 66 Ohio App.2d 41, 420 N.E.2d 131 (1979), *appeal denied*, (S.Ct. Ohio, January 25, 1980).

This Court has also consistently held that due process is not affended where a state, once it proves all the elements of a crime beyond a reasonable doubt, places upon the accused the burden of proving an affirmative defense. *Howze* v. *Marshall*, 716 F.2d 396, 398 (6th Cir. 1983); *Nieb* v. *Jago*, 695 F.2d 228, 231 (6th Cir.) (per curiam), *reh'g en banc denied, cert. denied*, 456 U.S. 980 (1982). However, this Court has emphasized that the trial judge must explicitly distinguish between the elements of the crime which the state must prove beyond a reasonable doubt and the elements of the affirmative defense which the accused must prove by a preponderance of the evidence. *Howze* v. *Marshall*, 716 F.2d 396, 398 (6th Cir. 1983); *Krzeminski* v. *Perini*, 614 F.2d 121, 123 (6th Cir. 1980). Moreover, due process is not violated by placing upon the accused the burden of proving self-defense where self-defense does not negate any element of the crime charged. *Thomas* v. *Arn*, 704 F.2d 865 (6th Cir. 1983). Self-defense does not negate any element of murder as defined by Ohio Rev. Code § 2903.02. *Thomas* v. *Arn*, 704 F.2d at 875-77; *Nieb* v. *Jago*, 695 F.2d at 231. Therefore, due process was not offended by jury instructions which placed upon Radford the burden of proving self-defense by a preponderance of the evidence.

Accordingly, it is ORDERED that the Judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-3-82-849

JERRY D. RADFORD,

Petitioner

vs.

ARNOLD R. JAGO;

Respondent

CERTIFICATE OF PROBABLE CAUSE FOR APPEAL

[Filed February 23, 1984]

This Court, having denied the Petitioner's application for a writ of habeas corpus and having dismissed said petition on January 20, 1984, now sets forth, in this entry, a certificate that probable cause for appeal exists, pursuant to 18 U.S.C. § 2254.

/s/ WALTER H. RICE
UNITED STATES DISTRICT JUDGE

APPENDIX C

JUDGMENT IN A CIVIL CASE

(Filed January 20, 1984)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION

JERRY D. RADFORD,

v.

ARNOLD R. JAGO;

C-3-82-849

Judge: Walter H. Rice

Decision by Court. This action came to or hearing before the Court with the judge named above presiding. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Petitioner's Writ for Habeas Corpus is DISMISSED

Clerk: Kenneth J. Murphy

By Deputy Clerk: /s/W. HINDERS

DATE: 1/20/84

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-3-82-849

JERRY D. RADFORD,

Petitioner,

vs.

ARNOLD R. JAGO;

Respondent.

DECISION AND ENTRY DISMISSING PETITION FOR WRIT OF HABEAS CORPUS; TERMINATION ENTRY

[Filed January 20, 1984]

This case is a petition for a writ of habeas corpus brought by a state prisoner pursuant to 28 U.S.C. § 2254. Having received Respondent's Return of Writ (doc. #3) and Petitioner's Brief (doc. #8), this matter is currently before the Court to "determine whether an evidentiary hearing is required" and if not, to "make such disposition of the petition as justice shall require." 28 U.S.C. § 2254, Rule 8(a).

In 1980, the Greene County (Ohio) Grand Jury indicted Petitioner on one count for the crime of aggravated murder, in violation of Ohio Rev. Code § 2903.01. Petitioner pleaded not guilty, and the case went to a jury trial. The jury returned a verdict of guilty on the lesser included offense of murder, in violation of Ohio Rev. Code § 2903.02. Petitioner was sentenced to a term of 15 years to life imprisonment.

At the trial, the trial judge instructed the jury on the ele-

ments of aggravated murder and murder, and placed the burden on the state to prove those elements by a preponderance of the evidence. Trial Transcript at 584-87. However, the judge (over Petitioner's objection) defined the elements of the affirmative defense of self-defense, and placed the burden of proof on that issue, by a preponderance of the evidence, on Petitioner. *Id.* at 588-90.

Petitioner appealed the verdict, alleging, *inter alia*, error on the burden of proof instruction. The appellate court rejected his arguments and affirmed the conviction. *State* v. *Radford*, Case No. 81-CA-15 (Ct. App. Greene County, November 12, 1981). The Ohio Supreme Court overruled Petitioner's motion for leave to appeal. *State* v. *Radford*, No. 82-66 (Ohio Sup. Ct., March 9, 1982).

On November 29, 1982, Petitioner filed for a writ of habeas corpus in this Court. The sole ground raised in support of the writ was that the Ohio trial court denied Petitioner due process of law, when it placed the burden on Petitioner to prove the affirmative defense of self-defense.

In his well-written and interesting brief, Petitioner argues that, on a variety of legal and policy grounds, the burden of proving the absence of self-defense must and should be on the state. However, the Court must agree with Respondent that this argument has been rejected by a series of habeas corpus decisions in the Sixth Circuit which have addressed this very aspect of Ohio law.

In *Carter* v. *Jago*, 637 F.2d 449 (6th Cir. 1980), *cert. denied*, 456 U.S. 980 (1982), petitioner was convicted of second degree murder in an Ohio court. As herein, the trial judge in that case instructed the jury that the burden was on the defendant to prove, by a preponderance of the evidence, the affirmative defense of self-defense. *Id.* at 452. The Sixth Circuit expressly held that such a burden did not offend due process, *id.* at 456-57 & n.6. In *Hooper* v. *Perini*, 641 F.2d 445 (6th Cir. 1981), *cert. denied*, 454 U.S. 817 (1982), petitioner had also been convicted of second degree murder in an Ohio

court. He raised the exact same alleged constitutional error raised in the instant case. The court did not reach the merits, since it found the error, if any, to be harmless, and because his trial counsel did not properly object to the instruction. *Id.* at 446. In a concurring opinion, Judge Celebrezze, referring to the opinion he authored in *Carter* v. *Jago*, would have rejected the claim on the merits. *Id.* at 447. Finally, in *Nieb* v. *Jago*, 695 F.2d 228 (6th Cir. 1982) (per curiam), *cert. denied*, 103 S. Ct. 3544 (1983), a petitioner was, again, convicted of second degree murder in an Ohio court and forced to prove the defense of self-defense by a preponderance of the evidence. Citing the *Carter* and *Hooper* decisions, the Court squarely held that such an instruction did not deny due process. *Id.* at 229, 231. However, the court also held that petitioner had failed to properly object to the instruction at trial. *Id.* at 230-31.

Petitioner makes a valiant but unconvincing effort to distinguish the holdings of these cases as "dicta," or as based on a misunderstanding of Ohio law regarding the elements of a crime. *Carter* is directly on point, and its understanding of Ohio law binds this Court. The discussion in *Nieb*, which expressly reaffirmed *Carter*, can best be described as an alternative holding, rather than mere dicta. Even if this Court were inclined to do so, any deviation from these decisions must come not from this Court but either from the Sixth Circuit itself or the United States Supreme Court.

This conclusion is underscored by a more recent Sixth Circuit decision, rendered shortly after briefing was completed in this case. In *Thomas* v. *Arn*, 704 F.2d 865 (6th Cir. 1983), petitioner was convicted of aggravated assault in an Ohio court, and the trial judge refused to instruct the jury that the state must prove the absence of self-defense beyond a reasonable doubt; the judge, apparently, did not expressly place the burden on that issue on either the state or the petitioner. *Id.* at 867, 869. In a lengthy discussion, the Sixth Circuit held that the trial judge's refusal "was in accord with Ohio law," *id.* at

870, and that the failure to place the burden on the state did not offend due process, *id.* at 872-78. The court explicitly noted, during that discussion, that the burden of proving self-defense could be placed on defendants. *Id.* at 878. *See also, Houze* v. *Marshall,* 716 F.2d 396, 400 (6th Cir. 1983) (Ohio habeas case reaffirming *Thomas* v. *Arn*).

All of these cases were decided under the 1974 enactment of Ohio Rev. Code § 2901.05(A), which had been judicially construed (by Ohio courts) to mean that only the burden of producing evidence (not the burden of proof) on affirmative defenses was on defendants. *Engle* v. *Isaac,* 456 U.S. 107, 111 (1982). In 1978, Ohio amended that provision to explicitly place on defendants the burden of proof on affirmative defenses. *Id.* at 112 n.4. The instant case was tried under the latter provision. Significantly, however, at least two of the above-mentioned decisions stated that the new provision did not affect the case. *See Carter* v. *Jago,* 637 F.2d at 452 n.1; *Thomas* v. *Arn,* 704 F.2d at 870 n.6. It would seem to follow that the new provisions, explicitly placing the burden on defendants to prove affirmative defenses, only lends support to applicability of those decisions to the instant case.

None of these decisions involved a conviction of murder under Ohio Rev. Code § 2903.02 (enacted January 1, 1974), as herein. But the analysis and holdings of those decisions remains fully applicable. The elements of aggravated murder under Ohio Rev. Code § 2903.01 (enacted January 1, 1974) are (1) purposely, (2) with prior calculation and design, and (3) cause of the death of another. The crime of murder contains the elements (1) purposely and (2) cause the death of another. *See State* v. *Pierce,* 64 Ohio St. 2d 281, 414 N.E.2d 1038 (1980) (per curiam); *State* v. *Muscatello,* 57 Ohio App. 2d 231, 247, 387 N.E.2d 627, 639 (Cuyahoga Cty. 1977), *aff'd,* 55 Ohio St. 2d 201, 378 N.E.2d 738 (1978). These elements were properly given in the instructions in the instant case. Trial Transcript at 584,587. Contrary to Petitioner's arguments, self-defense does not negate any of the listed ele-

ments of the crimes of aggravated murder or murder. *See Thomas* v. *Arn*, 704 F.2d at 875-77; *Nieb* v. *Jago*, 695 F.2d at 231. Thus, it does not offend due process to place the burden of proof on self-defense of the defendant. *Id.*

Two recent Sixth Circuit decisions do not change this result. In *Cherry* v. *Jago*, No. 80-3110 (6th Cir. Dec. 8, 1983), a habeas petitioner was convicted in Ohio of first degree murder. Slip. op. at 2. Petitioner alleged, *inter alia*, that "confusing" jury instructions improperly placed on him the burden of proving self-defense beyond a reasonable doubt. *Id.* The Sixth Circuit disagreed, finding that the instructions, in fact, only placed a burden on petitioner to come forward with evidence on that issue. *Id.* at 4-7. Implicit in the court's discussion, though, was the assumption that placing the burden of proof on that issue on petitioner would, in fact, violate Ohio law *and* the federal due process clause. Oddly, the court neither cited nor distinguished the *Carter*, *Hooper*, or *Nieb* cases discussed above.

However, it appears that the petitioner in *Cherry* was tried *before* 1978, under law which, at the time, did not place the burden of proving affirmative defenses on defendants. *Id.* at 2. Any such instruction would have violated *Ohio* law. *Accord*, *id.* at 11 (Jones, J., dissenting). The *Cherry* court's discussion of pre-1978 Ohio law has little, if any, relevance to this case, and its discussion of the burden of proof issue, as a violation of *federal* due process, must be regarded and treated as mere dicta by this Court.

Likewise, in *Melchoir* v. *Jago*, No. 890-3500 (6th Cir. Dec. 15, 1983), a habeas petitioner was convicted in an Ohio court of aggravated murder and aggravated robbery. Slip op. at 1. The state courts found that a jury instruction, placing the burden of proof on the issue of self-defense on the petitioner, was improper under Ohio law at the time (between 1974 and 1978). *Id.* at 4. Nevertheless, the state courts found this to be harmless error. *Id.* The Sixth Court noted the *Hooper* and *Carter* decisions, discussed above, and found that dicta in

Engle v. *Isaac*, 456 U.S. at 122, "may cast doubt upon" the validity of these decisions. Slip. op. at 11. However, the Court found it unnecessary to "resolve this open question," *id.*, since it agreed that any error was harmless, *id.* at 15. Citing, *inter alia*, the *Carter* decision, Judge Contie in a concurring opinion would have reached the merits and found that the instruction, while it may have violated *state* law, did not violate *federal* due process. *Id.* at 16-17.

Melchoir, like *Cherry*, does not control the instant case. The *Melchoir* Court's discussion of the "open question" is itself dicta. This Court, like Judge Contie, must follow the *Carter*, *Hooper*, *Neib* and *Arn* decisions as controlling until and if they are overruled by the Sixth Circuit or the United States Supreme Court.

For these reasons, the Court dismisses Petitioner's writ. No factual issues being alleged or present, an evidentiary hearing is unnecessary. *Townsend* v. *Sain*, 372 U.S. 293 (1963).

This case is hereby ordered terminated upon the docket records of this Court.

/s/ WALTER H. RICE
UNITED STATES DISTRICT JUDGE

APPENDIX E

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1982 TERM
To wit: March 9, 1982

State of Ohio,

Appellee,

vs.

Jerry Radford,

Appellant.

No. 82-66

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR GREENE COUNTY

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00 paid by Affidavit of Poverty.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....
..... Clerk
..... Deputy

APPENDIX F

IN THE COURT OF APPEALS OF
GREENE COUNTY, OHIO

Case No. 81-CA-15

STATE OF OHIO

Plaintiff-Appellee

vs.

JERRY RADFORD

Defendant-Appellant

JOURNAL ENTRY

[Filed November 24, 1981]

Pursuant to the decision rendered by this court on November 10, 1981, the judgment of the Court of Common Pleas of Greene County is hereby affirmed.

/s/ JOSEPH D. KERNS, Judge
/s/ RICHARD K. WILSON, Judge
/s/ JAMES A. BROGAN, Judge

APPENDIX G

IN THE COURT OF APPEALS OF
GREENE COUNTY, OHIO

Case No. 81-CA-15

STATE OF OHIO
Plaintiff-Appellee

vs.

JERRY RADFORD
Defendant-Appellant

OPINION

Rendered on the 10th day of November, 1981.

William F. Schenck, Prosecuting Attorney, By: Vicki R. Patton-Hulce, Asst., Third Floor, Greene County Court House, Xenia, Ohio 45385
Attorneys for Plaintiff-Appellee

John H. Rion, Attorney at Law, First National Plaza, Suite 1630, Dayton, Ohio 45402
Attorney for Defendant-Appellant

KERNS, P. J.

The defendant, Jerry Radford, was tried by jury in the Court of Common Pleas of Greene County and found guilty of murder, and from the judgment and sentence thereupon entered, Radford has appealed to this court.

The first assignment of error is as follows:

> "The appellant's preclusion by the trial court from presenting polygraph evidence violated his Fourteenth Amendment due process rights to a fair trial and his Sixth Amendment rights to compulsory process."

In support of this alleged error, the appellant argues that he should have been able to introduce the results of a polygraph examination notwithstanding the absence of any written stipulation by the prosecution, but this argument finds no support in Ohio. State v. Souel, 53 Ohio St. 2d 123. The Ohio rule is based upon a preliminary written agreement by both parties, and even then, the admission of such testimony is subject to the discretionary authority of the trial court. See, State v. Back, Clark County Court of Appeals, No. 1326 (March 24, 1980). The first assignment of error is overruled.

The second assignment of error is based upon an allegation that the trial court should not have instructed the jury on both aggravated murder and murder. According to the record, the trial court instructed the jury on self-defense, aggravated murder, and murder, and the appellants claims that the affirmative defense to aggravated murder made it improper to charge the jury on the lesser included offense of murder.

In support of this assigned error, the appellant relies to some extent upon State v. Nolton, 19 Ohio St. 2d 133, and a literal application of the syllabus of that case without reference to to the qualifying language of the opinion from whence it came arguably could give reasonable support to the proposal that the jury in this case should not have been instructed upon the lesser included offense of murder. However, the more recent case of State v. Wilkins, 64 Ohio St. 2d 382, has served to extricate the law from the so-called quagmire of confusion caused by the Nolton case, and therein, the Supreme Court of Ohio stated the applicable rule as follows:

> "If the evidence adduced on behalf of the defense is such that if accepted by the trier of fact it would constitute a complete defense to all substantive elements of the crime charged, the trier of fact will not be permitted

> to consider a lesser included offense unless the trier of fact could reasonably find against the state and for the accused upon one or more of the elements of the crime charged, and for the state and against the accused on the remaining elements, which, by themselves, would sustain a conviction upon a lesser included offense."

The Nolton rule was subjected to further refinement in State v. Solomon, 66 Ohio St. 2d 214, and therefore, if under any reasonable view of the evidence it is possible for the triers of the facts to find the defendant not guilty of aggravated murder, but guilty of murder, the instruction on the lesser included offense should be given. In the present case, the jury could have rejected the affirmative defense altogether, and then have proceeded to conclude that Radford killed Harris without prior calculation or design. Hence, the trial court properly charged the jury upon the lesser included offense. State v. Long, 53 Ohio St. 2d 91:99. The second assignment of error is overruled.

The third assignment of error turns back to the case of State v. Robinson, 47 Ohio St. 2d 103, which held that a defendant did not have the burden of establishing the defense of self-defense by a preponderance of the evidence, but since the General Assembly amended Section 2901.05(A), Revised Code, in 1978, this court has commented upon similar assignments of error as follows:

> "Prior to the enactment of the new criminal code (Am. Sub. H.B. 511) on January 1, 1974, the well established rule in Ohio was that the defendant had the burden of going forward and of establishing affirmative defenses (such as self defense, insanity, etc.) by a preponderance of the evidence. See e.g. State vs. Vargo, 116 Ohio St. 495; State vs. Poole, 33 Ohio St. 2d 18; 15 A. Ohio Jur. 2d Crim. Prac & Pro., Section 207 et seq. However, after the enactment of the Criminal Code, the Supreme Court ruled that pursuant to R.C. 2901.05(A), a defendant did not have the burden of establishing an affirmative de-

fense by a preponderance of the evidence. State vs. Robinson, 47 Ohio St. 2d 103.

As a reaction to the Robinson decision, the General Assembly amended R.C. 2910.05(A), effective November 1, 1978, at follows:

> 'Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, *and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.* (Emphasis ours).

The amendment of R.C. 2901.05(A), effective November 1, 1978, expressly readopted the long established rule that the burden of proving an affirmative defense by a preponderance of the evidence is upon the accused. State vs. Gall, 64 Ohio App. 2d, Nos. 1102 & 1104 (Greene Co., March 26, 1980). By reinstating the law as it existed prior to 1974, State vs. Vargo, supra, and the long line of cases espousing the aforementioned rule are now dispositive of this assignment of error."

The scholarly argument submitted in support of this assignment of error is not without some merit, but in our opinion, due process does not require the State to disprove affirmative defenses. The third assignment of error is overruled.

The fourth assignment of error relates to the refusal of the trial court to admit into evidence certain written statements and/or notes recorded by some of the witnesses who testified at the trial. The notes and statements pertained to their knowledge of the homicide, but the trial court excluded these exhibits from evidence primarily because both the prosecution and the defense had ample opportunity to question each witness concerning any statements or notes they made concerning the case.

A trial court had broad discretion in the admission or rejection of evidence (State v. Hymore, 9 Ohio St. 2d 122), and in the absence of a clear showing of an abuse of discretion, this court may not interfere. See, State v. Long, 53 Ohio St. 2d 91. Furthermore, it is doubtful, under any circumstances, that the exclusion of the evidence had any material effect upon the outcome of the case. The fourth assignment of error is overruled.

The fifth assignment of error alludes to the action of the trial court in overruling a motion to dismiss the indictment. In this regard, the record discloses that Radford was indicted for aggravated murder on September 26, 1980. The only witness to testify before the Grand Jury was Detective Sayre, a Fairborn police officer who was assigned to investigate the homicide, and with a view to procedure, the appellant argues that he has a constitutional right to have the Grand Jury hear evidence rather than a mere summary by an investigating police officer.

However, a Grand Jury is not charged with a final adjudication of guilt or innocence. It is an ex-parte investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against a person. U.S. v. Calandra, 414 U.S. 338. And it is given considerable flexibility, therefore, in the evidence it may hear and the procedures it may employ. Costello v. U.S., 350 U.S. 359.

In the Costello case, the only evidence presented to the Grand Jury was the hearsay testimony of three investigating officers, and in discussing the problems associated with challenges to the adequacy of the evidence presented to a Grand Jury, the United States Supreme Court observed as follows:

> "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the compe-

> tency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

In the present case, the indictment was returned by a legally constituted and unbiased Grand Jury, and in the absence of any unusual departure from accepted procedure, the fifth assignment of error is overruled.

The sixth assignment of error also challenges the refusal of the trial court to dismiss the indictment, but for the additional reason that the Grand Jury did not consist of fifteen members. However, the Grand Jury that indicted Mr. Radford consisted of nine members, and Crim R. 6(A) and 6(F) provide that a Grand Jury shall consist of nine members and that an indictment may be returned upon the concurrence of seven or more jurors.

In State v. Dozier, Montgomery County Court of Appeals, No. 6022 (May 6, 1980), this court discussed a similar problem as follows:

> "Ohio Constitution, Article I, Section 10 provides that, the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. Until July 1, 1973, this law was R.C. Section 2939.02 and R. C. 2939.20. On July 1, 1973, the Rules of Criminal Procedure became effective. Crim. R. 6(A) and 6(F) reduced the number of grand jurors which had been required by R.C. Section 2939.02 and R.C. Section 2939.20. Pursuant to Ohio Constitution, Article IV, Section 5 of the Criminal Rules adopted supersede all conflicting procedural statutes. State v. Hughes, 41 Ohio St. 2d. 208, 324 N.E. 2d 731 (1975). The number of grand jurors is a procedural matter. The court in State v. Juergens, 55 Ohio

App. 2d 104, 379 N.E. 2d 602 (1977) stated the following:

> "We conclude from this reasoning as well as from the foregoing authorities that the fixing of such number relates to the procedure for returning the indictment by the grand jury and not to the right to have such indictment returned by the grand jury. The number is properly the subject of the procedural rule adopted by the supreme court in the manner provided by Section 5(B), Article IV, of the Ohio Constitution."

See also, State v. Wilson, 57 Ohio App. 2d 11, 384 N.E. 2d 1300 (1978)."

Hence, it appears that the appellant was indicted by a Grand Jury which was constituted pursuant to constitutional and statutory requirements, and as in the Dozier case, the alleged error must be overruled.

Finding no prejudicial error in the record, the judgment of the Court of Common Pleas will be affirmed.

WILSON, J. and BROGAN, J. concur.

APPENDIX H

IN THE COURT OF COMMON PLEAS,
GREENE COUNTY, OHIO

CASE No. 80 CR 279

STATE OF OHIO

Plaintiff

-vs-

JERRY RADFORD

Defendant

JUDGMENT
(Sentencing)
(Filed January 30, 1981)

On the 30th day of January, 1981, the Defendant Jerry Radford was present in open court with his counsel John Rion for sentencing.

The Judge personally informed the Defendant that on the 29th day of January, 1981 he had Been Found Guilty by the Jury Verdict after Trial of a violation of Section 2903.02(A), of the Ohio Revised Code, and considering the foregoing, the Judge found the Defendant guilty of the above violation.

The Judge addressed the Defendant personally and asked him is he wished to make a statement in his own behalf or present any information in mitigation of punishment. The judge afforded counsel an opportunity to speak on behalf of the Defendant. Pursuant to Section 2951.02 (F)(1), the Defendant is not eligible for probation consideration.

The Judge received and considered the written report of the Greene County Adult Probation Department, the statement of counsel, and the statement, information and evidence presented by the Defendant and found that the opportunity of probation should be denied/granted the Defendant.

The Judge once again personally addressed the Defendant and inquired whether he had anything further to say as to why the judgment of the Court should not be imposed upon him/her at this time. The Defendant had nothing further to say but what had already been said and failed to show sufficient cause as to why judgment should not be pronounced.

Therefore it is the ORDER of the Court that the Defendant Jerry Radford be sentenced to the Columbus Correctional Facility, Columbus, Ohio for a period of time not less than 15 years to life for the violation of Revised Code Section 2903.02 (A) and pay a fine in the sum of $ none.

The Defendant Jerry Radford is entitled to jail time credit of 5 days pursuant to Revised Code Section 2967.191.

The Defendant was notified of his right to appeal as required by Criminal Rule 32 (A) (2).

Costs of proceedings are assessed against the Defendant for which execution is hereby awarded.

All bonds posted in this matter are ordered released.

The Defendant is remanded to the Sheriff of Greene County, Ohio, for transportation to the institution, according to law.

APPROVED:
/s/ M. DAVID REID
Common Pleas Judge

/s/ GREGORY LOCKHART
Prosecuting Attorney
/s/ JOHN H. RION
Attorney for Defendant

TABLE 1

BURDENS OF PROOF ON SELF-DEFENSE IN THE VARIOUS STATES

Type A: The defendant has no burden other than the assertion of self-defense, as the absence of self-defense is considered an element of the offense.

Type B: The defendant has the burden of going forward with the evidence showing self-defense. The quality of the evidence required varies from state to state. The range is "some credible evidence" to "evidence sufficient to create a reasonable doubt in the minds of the jurors." Once the defendant has met this burden of production, the state must show the absence of self-defense or the defendant is acquitted.

Type C: In order to be acquitted, the defendant must prove by a preponderance of the evidence that he acted in self-defense.

Type A	Type B		Type C
Louisiana	Alabama	Missouri	Ohio
Oregon	Alaska	Montana	
	Arizona	Nebraska	
	Arkansas	Nevada	
	California	New Hampshire	
	Colorado	New Jersey	
	Connecticut	New Mexico	
	Delaware	New York	
	Florida	North Carolina	
	Georgia	North Dakota	
	Hawaii	Oklahoma	
	Idaho	Pennsylvania	
	Illinois	Rhode Island	
	Indiana	South Carolina	
	Iowa	South Dakota	
	Kansas	Tennessee	
	Kentucky	Texas	
	Maine	Utah	
	Maryland	Vermont	
	Massachusetts	Virginia	
	Michigan	Washington	
	Minnesota	West Virginia	
	Mississippi	Wisconsin	
	Wyoming		

TABLE 2

Alabama	*Ex parte Johnson*, 433 So. 2d 479 (1983); *Vaughn* v. *State*, 293 Ala. 365, 304 So. 2d 6 (1974)
Alaska	*Weston* v. *State*, 682 P.2d 1119 (1984); *Toomey* v. *State*, 581 P.2d 1124 (1978)
Arizona	*State* v. *Denney*, 119 Ariz. 131, 579 P.2d 1101 (1978); *Everett* v. *State*, 88 Ariz. 293, 356 P.2d 394 (1960)
Arkansas	Arkansas Criminal Code Sections 41-110 (3), 41-115(5)(c), and 41-502; *Thomas* v. *State*, 266 Ark. 162, 583 S.W.2d 32 (1979)
California	*People* v. *Adrian*, 135 Cal. App. 3d 335, 185 Cal. Rptr. 506 (1982); *People* v. *Sanchez*, 30 Cal. 2d 560, 184 P.2d 673 (1947)
Colorado	Colorado Revised Statutes Sections 18-1-407 and 18-1-704
Connecticut	*State* v. *Cassino*, 188 Conn. 237, 449 A.2d 154 (1982); Connecticut General Statutes Annotated Sections 53a-12(a), 53a-16, and 53a-19 (West 1971)
Delaware	*Hamilton* v. *State*, 343 A.2d 594 (1975); 11 Delaware Code Sections 461 and 464
Florida	*Knight* v. *State*, 392 So. 2d 337 (1981); *Bolin* v. *State*, 297 So. 2d 317 (3d Dist. Ct. App. 1974)
Georgia	*Holloway* v. *McElroy*, 632 F.2d 605 (5th Cir. 1980)
Hawaii	*State* v. *McNulty*, 60 Haw. 259, 588 P.2d 438 (1978); Hawaii Revised Statutes Sections 703-301, 701-115(2)(a), and 703-304
Idaho	*State* v. *Jurko*, 245 P. 685 (1926)

Illinois	*People* v. *Sanchez*, 51 Ill. Dec. 266, 420 N.E. 2d 680 (1981); *People* v. *Woods*, 81 Ill. 2d 537, 43 Ill. Dec. 733, 410 N.E.2d 866 (1980); Illinois Revised Statutes Chapter 38, Section 3-2
Indiana	*Green* v. *State*, 438 N.E.2d 266 (1982); *Loyd* v. *State*, 398 N.E.2d 1260 (1980)
Iowa	*State* v. *Cruse*, 228 N.W.2d 28 (1975); *State* v. *Vick*, 205 N.W.2d 727 (1973); *State* v. *Wilson*, 234 Iowa 60, 11 N.W.2d 737 (1943)
Kansas	*State* v. *Smith*, 161 Kan. 230, 167 P.2d 594 (1946); *State* v. *Beard*, 220 Kan. 580, 552 P.2d 900 (1976)
Kentucky	*Pace* v. *Commonwealth*, 561 S.W.2d 664 (1978); Kentucky Revised Statutes Sections 500.070(1) and 503.050 (1975)
Louisiana	*State* v. *Savoy*, 418 So. 2d 547 (1982); *State* v. *Collins*, 306 So. 2d 662 (1975); *State* v. *Patterson*, 295 So. 2d 792 (1974)
Maine	*State* v. *Smith*, 472 A.2d 948 (1984); *State* v. *Millet*, 273 A.2d 504 (1971)
Maryland	*Squire* v. *State*, 280 Md. 132, 368 A.2d 1019 (1977); *State* v. *Evans*, 278 Md. 197, 362 A.2d 629 (1976)
Massachusetts	*Commonwealth* v. *Zezima*, 387 Mass. 748, 443 N.E.2d 1282 (1982); *Commonwealth* v. *Harrington*, 379 Mass. 466, 399 N.E.2d 475 (1980); *Commonwealth* v. *Rodriguez*, 370 Mass. 684, 352 N.E.2d 203 (1976)
Michigan	*People* v. *Prather*, 328 N.W.2d 556 (1982); *People* v. *Jackson*, 390 Mich. 621, 212 N.W. 2d 918 (1973)
Minnesota	*State* v. *Austin*, 332 N.W.2d 21 (1983); *State* v. *Harvey*, 277 N.W.2d 344 (1979); *State* v. *Columbus*, 258 N.W.2d 122 (1977)

Mississippi	*Sloan* v. *State*, 368 So. 2d 228 (1979)
Missouri	*State* v. *Minnis*, 486 S.W.2d 280 (1972); *State* v. *Holt*, 434 S.W.2d 576 (1968); *State* v. *McGowan*, 621 S.W.2d 557 (Mo. App. 1981)
Montana	*State* v. *Lopez*, 185 Mont. 187, 605 P.2d 178 (1980); *State* v. *Grady*, 166 Mont. 168, 531 P.2d 681 (1975)
Nebraska	*State* v. *Samuels*, 205 Neb. 585, 289 N.W.2d 183 (1980); *State* v. *Archbold*, 178 Neb. 433, 133 N.W.2d 601 (1965)
Nevada	*St. Pierre* v. *State*, 96 Nev. 888, 620 P.2d 1240 (1980); *Kelso* v. *State*, 95 Nev. 37, 588 P.2d 1035 (1979)
New Hampshire	New Hampshire Revised Statutes Annotated Sections 626: 7(I)(a) and 627: 1 and 4(II)(a)
New Jersey	*State* v. *Gardner*, 51 N.J. 444, 242 A.2d 1 (1968); *State* v. *Chiarello*, 69 N.J. Super. 479, 174 A.2d 506 (1961)
New Mexico	*State* v. *Martinez*, 95 N.M. 421, 622 P.2d 1041 (1981); *State* v. *Cochran*, 78 N.M. 292, 430 P.2d 863 (1967)
New York	New York Penal Law 25.00, 35.00, and 35.10 (McKinney 1965)
North Carolina	*State* v. *Boone*, 299 N.C. 681, 263 S.E.2d 758 (1980); *State* v. *Herbin*, 298 N.C. 441, 259 S.E. 2d 263 (1979); *State* v. *Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975)
North Dakota	*State* v. *Hazlet*, 16 N.D. 426, 113 N.W. 374 (1907)
Ohio	Ohio Revised Code Section 2901.05(A)
Oklahoma	*Cottrel* v. *State*, 458 P.2d 328 (1969)

Oregon	Oregon Revised Statutes Sections 161.055, 161.190, and 161.209
Pennsylvania	*Commonwealth* v. *Upsher*, 497 Pa. 621, 444 A.2d 90 (1982); *Commonwealth* v. *Schaller*, 493 Pa. 426, 426 A.2d 1090 (1981); *Commonwealth* v. *Black*, 376 A.2d 627 (1977)
Rhode Island	*State* v. *Baker*, 417 A.2d 906 (1980); *In re Doe*, 390 A.2d 920 (1978)
South Carolina	*State* v. *Davis*, 317 S.E.2d 452 (1984)
South Dakota	*State* v. *Reddington*, 80 S.D. 390, 125 N.W. 2d 58 (1963)
Tennessee	*Henley* v. *State*, 520 S.W.2d 361 (1974); *Myers* v. *State*, 185 Tenn. 264, 206 S.W.2d 30 (1947)
Texas	*Luck* v. *State*, 588 S.W.2d 371 (1979)
Utah	*State* v. *Torres*, 619 P.2d 694 (1980)
Vermont	*State* v. *Barrett*, 266 A.2d 441 (1970)
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CASE NO. 84–1320

In The Supreme Court of the United States

OCTOBER TERM, 1984

JERRY D. RADFORD,

Petitioner,

v.

A.R. JAGO, Superintendent,
London Correctional Institution,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

WHETHER, CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, A STATE MAY PLACE THE BURDEN OF PROOF WITH RESPECT TO THE AFFIRMATIVE DEFENSE OF SELF-DEFENSE UPON THE ACCUSED.

PARTIES

The respondent in this action is A.R. Jago in his capacity as Superintendent of the London Correctional Institution at London, Ohio. The petitioner is Jerry D. Radford.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is unreported. (1a)[1] The decision of the United States District Court for the Southern District of Ohio, Western Division, is unreported. (6a) The decision of the Ohio Court of Appeals for the Second Judicial District is also unreported. (14a).

JURISDICTION

The opinion of the United States Court of Appeals was entered on November 19, 1984. Jurisdiction is alleged by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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[1] All appendix references are to the appendix contained in the petition for writ of certiorari.

This case also involves Ohio Revised Code Section 2903.02 which provides:

> (A) No person shall purposely cause the death of another.

STATEMENT OF THE CASE

Petitioner Jerry D. Radford was indicted by the January, 1980 Term of the Greene County, Ohio, Grand Jury on one (1) count for the crime of aggravated murder in violation of Ohio Revised Code Section 2903.01. Petitioner entered a plea of not guilty and the cause came on for jury trial. The jury returned a verdict of guilty as to the lesser included offense of murder in violation of Ohio Revised Code Section 2903.02. Petitioner was thereupon sentenced to a term of fifteen (15) years to life imprisonment.

Petitioner perfected an appeal of said judgment to the Ohio Court of Appeals for the Second Judicial District. On November 10, 1981, the appellate court issued an opinion affirming the Common Pleas Court judgment. (14a) The Supreme Court of Ohio thereafter denied petitioner's motion for discretionary review.

Having exhausted his state court remedies, petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 with the United States District Court for the Southern District of Ohio, Western Division. As the sole ground for relief petitioner alleged that he was denied due process when the Ohio trial court instructed the jury that the burden of persuasion as to the affirmative defense of self-defense was upon the accused by a preponderance of the evidence. On January

20, 1984, the district court issued an opinion denying petitioner's petition as without merit. (6a)

Petitioner perfected a timely appeal to the United States Court of Appeals for the Sixth Circuit. Subsequent to briefing, the appellate court determined that oral argument was not necessary and, on November 19, 1984, issued an unreported decision affirming the district court's judgment. (1a)

The facts underlying petitioner's murder conviction are straight forward. The prosecution presented evidence that petitioner had "fronted", i.e., transferred on credit, drugs to the victim Keith Harris. Harris was subsequently arrested on a drug charge and, as a result, either could not or would not pay petitioner. Two (2) days prior to the homicide, petitioner met with Harris and informed him that he would get his money one way or the other. Petitioner told a third party that he intended to kill Harris because of Harris' refusal to pay the drug debt. On the date of murder, Harris and others were "partying" at petitioner's house. During the course of the evening, Harris took a .38 caliber handgun out of his girlfriend's purse and asked petitioner if he had any ammunition for the weapon. Harris then placed the empty weapon back into his girlfriend's purse. Later that same evening, petitioner shot and killed Harris.

Petitioner chose to testify in his own behalf. Petitioner admitted that he intentionally shot the decedent twice at close range with a high powered handgun but claimed that he was justified in doing so because the decedent was "charging" him while carrying a weapon.

The difficulty with petitioner's testimony was two fold. Initially, petitioner had been present when the

deceased had removed the .38 caliber handgun from his girlfriend's purse and informed petitioner and others that he had no bullets for it. The deceased then placed the empty weapon back in his girlfriend's handbag. Moreover, the police were summoned immediately subsequent to the shooting. The investigating officers found the empty .38 caliber gun in the purse of the deceased's girlfriend. A thorough search of the premises did not result in the finding of any bullets. In sum, the deceased was unarmed when petitioner shot him and petitioner's testimony to the contrary was wholly destroyed by the unassailable physical evidence.

At the conclusion of petitioner's trial, the state trial judge gave the following jury instruction with respect to the issue of self-defense:

> The Defendant claims that what he did was justified on the basis of self defense. If a person is assaulted by another who apparently intends to kill or cause great bodily harm, the person assaulted is not required to retreat but may repel force with force and may kill his assailant if it reasonably appears to the Defendant to be necessary to do so.
>
> To constitute self defense there must have been on the part of the Defendant a careful use of his faculties and reasonable grounds to honestly believe there was an immediate danger to his person or his life. There must have been a sufficient act coupled with an apparent present ability to carry it out to cause the Defendant to reasonably believe that the other party intended to kill or to do him great bodily

harm and that the shooting was necessary to save himself from death or great bodily harm.

If the Defendant has reasonable grounds and an honest belief that he was in imminent danger of death or great bodily harm, then he was justified even though he was mistaken as to the existence of such danger.

A Defendant is not in a position to claim self defense if he sought trouble and armed with a dangerous weapon he provoked a fight, and did not attempt to avoid it.

If in the careful and proper use of his faculties, the defendant honestly believed and had reasonable grounds to believe that an assailant was not able and did not intend to kill or do great bodily harm to the Defendant, then the Defendant having notice of his adversary's position was released from the danger, and the right to use force in self defense ended. If thereafter the Defendant continues to fight, he becomes the aggressor and a subsequent injury to another is unlawful.

The burden of proving the defense of self defense is upon the Defendant. He must establish such defense by a preponderance of the evidence.

Preponderance of the evidence is the greater weight of the evidence. That is, evidence that you believe because it outweighs or overbalances in your minds the evidence opposed to it.

A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed. Quality may or may not be identical with quantity or the greater number of witnesses.

In determining whether or not an issue has been proved by a preponderance of the evidence, you should consider all the evidence bearing upon that issue regardless of who produced it.

If the weight of the evidence is equally balanced or if you are unable to determine which side of an issue has the preponderance, then the Defendant has not established such issue.

If the Defendant fails to establish the defense of self defense, the State must still prove all the elements of the crime charged by proof beyond a reasonable doubt.

If you find that the State proved beyond a reasonable doubt all the essential elements of the crime of aggravated murder

> or murder and that the Defendant failed to prove by a preponderance of the evidence the defense of self defense, your verdict must be guilty.
>
> If you find that the State failed to prove beyond a reasonable doubt any one of the essential elements of the crime of aggravated murder or murder or if you find that the Defendant proved by a preponderance of the evidence the defense of self defense, then you must find the Defendant not guilty. [Tr. 588-592] [Emphasis added].

The foregoing charge is the standard self defense jury instruction which is given throughout the State of Ohio.

SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment does not mandate that a State assume the burden of negating an affirmative defense by proof beyond a reasonable doubt. A State may, consistent with the Due Process Clause, apply the common law rule which requires that a criminal defendant who interposes a confession and avoidance defense of excuse or justification demonstrate the existence of such an affirmative defense by a preponderance of the evidence.

ARGUMENT

A State May, Consistent With The Due Process Clause Of The Fourteenth Amendment, Require That A Criminal Defendant Demonstrate The Existence Of An Affirmative Defense By A Preponderance Of The Evidence.

The jury instruction challenged herein derives from the common law rule which termed an affirmative defense as a "confession and avoidance" technique which, despite proof beyond a reasonable doubt as to the crime charged, allowed for the return of a not guilty verdict based upon certain independent defenses predicated upon either "excuse" [duress, insanity, intoxication] or "justification" [self defense]. At common law, it was incumbent upon the accused to demonstrate the existence of such an "avoidance" technique by a preponderance of the evidence.

That Ohio has followed the common law view since its inception into statehood is demonstrated by the following language of the Supreme Court of Ohio in *State v. Poole,* 33 Ohio St. 18, 294 N.E. 2d 888 (1973):

> This Court has consistently recognized that there are certain "justification[s] for admitted conduct" allowed to a defendant in a criminal case, provable for the most part under the plea of not guilty, which are referred to as "affirmative defenses." As characterized by one authority, they represent not a mere denial or contradiction of evidence which the prosecution has offered as proof of an essential element of the crime charged, but, rather,

> they represent a substantive or independent matter "which the defendant claims exempts him from liability even if it is conceded that the facts claimed by the prosecution are true." Among those defenses, in Ohio, are self defense, duress, insanity, and intoxication. Affirmative defenses must be proved by a preponderance of the evidence.
> 33 Ohio St. 2d at 19.

Petitioner alleges that the jury instruction as to self defense was constitutionally infirm for the following two reasons: (1) self defense negates the element of purpose; and (2) all states must, as a matter of constitutional imperative, choose to disprove self defense beyond a reasonable doubt as a matter of substantive due process. Neither assertion is meritorious.

Petitioner was convicted of murder which is defined by Ohio Revised Code Section 2903.02 as follows:

> No person shall purposely cause the death of another.

In the instant case, petitioner admitted that he "caused the death" of the decedent and further admitted that he did so "purposely." Even had petitioner not made such admission, the jury could "rationally" have found that firing two (2) rounds from a magnum pistol into the body of the decedent at close range constituted a purposeful or intentional killing.

The gist of petitioner's argument is based on the following syllogism — if one fires in self defense, it is

logically inconsistent to find that such person intended to purposely kill his attacker. Common sense alone demonstrates the fallacy of petitioner's argument. If, for instance, an individual is attacked by a much larger and stronger person who is armed with a knife and has announced his intention to commit mayhem, any rational person would intentionally and purposely kill the attacker.[2] While such hypothetical person would, quite literally, be guilty of murder as he "purposely caused the death of another," the confession and avoidance device of self defense would allow for nonpunishment of the crime *if* the individual could demonstrate that he more likely than not was justified under a reasonable man standard.

Petitioner's argument is essentially grounded upon a *Mullaney v. Wilbur,* 421 U.S. 684 (1975) analysis, i.e., petitioner asserts that "absence of self defense" is an "element" of murder and that the state may not therefore "shift the burden of proof" to the accused. The United States Court of Appeals for the Sixth Circuit has repeatedly rejected such argument. See e.g., *Carter v. Jago,* 637 F. 2d 449, 452-457 (6th Cir. 1980); *Nieb v. Jago,* 695 F. 2d 228, 231 (6th Cir. 1982); *Jones v. Jago,* 710 F. 2d 45, 47 (6th Cir. 1982); *Thomas v. Arn,* 704 F. 2d 865, 872-878 (6th Cir. 1983); *Long v. McKeen,* 722 F. 2d 286, 289 (6th Cir. 1983). See also *Engle v. Isaac,* 456 U.S. 107, 136 (1982) [Justice Stevens concurring]. The Ohio courts are in full accord. See *State v. Davis,* 8 Ohio App. 3d 205, 456 N.E. 2d 1256 (1982); *State v. Snowden,* 7 Ohio App. 3d 358, 455 N.E. 2d 1058 (1982); *State v. Morris,* 8 Ohio App. 3d 12, 455 N.E. 2d 1352 (1982); *State v. Howze,* 66 Ohio App. 2d 41, 420 N.E. 2d 131 (1979).

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[2] This, of course, presupposes that an alternate course of action, e.g., escape, is unavailable.

Petitioner finally contends that the Due Process Clause of the Fourteenth Amendment mandates as a matter of substantive due process that all jurisdictions make affirmative defenses a "quasi-element" of criminal offenses and thereby require that the prosecution "disprove" such defenses beyond a reasonable doubt. Petitioner thus desires to constitutionally interject an "element" to homicide prosecutions which the Ohio legislature has expressly rejected. Aside from the obvious fact that our system of federalism does not allow the federal judiciary to rewrite state criminal statutes, this Court has consistently recognized that "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required" and the Court has thus declined" . . . to adopt as a constitutional imperative, operative country-wide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of the accused." *Patterson v. New York,* 432 U.S. 197, 210 (1977).

This Court has only recently declined to review precisely the question presented herein, *Moran v. Ohio,* _____U.S._____, 105 S. Ct. 350 (1984) [Brennen, J. dissenting from the denial of certiorari]. Absent a demonstrable change in circumstances, certiorari should likewise be denied in the instant controversy.

CONCLUSION

For the aforementioned reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the requite number of copies of the foregoing Respondent's Brief in Opposition to Petition have been served on petitioner, Jerry D. Radford, by forwarding such copies through the office of his counsel, Steven Michael Cox, Attorney at Law, Suite 380 Talbott Tower, 131 North Ludlow Street, Dayton, Ohio 45402, by United States Mail, postpaid, this _____ day of May, 1985. I further certify that all parties required to be served have been so served. Petitioner's address is the London Correctional Institution at London, Ohio.

RICHARD DAVID DRAKE
Assistant Attorney General